

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	) CC Docket No. 91-142
ALGREG CELLULAR ENGINEERING	) File No. 10607-CL-P-307-A-89
For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A)
in Market 307 - Alabama 1-Franklin)
CRANFORD CELLULAR COMMUNICATIONS	) File No. 10611-CL-P-311-A-89
For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A)
in Market 311 - Alabama 5-Cleburne)
NEW ERA CELLULAR)
TELE-COMMUNICATIONS	) File No. 10563-CL-P-312-A-89
For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A)
in Market 332 - Arkansas 9-Polk)
BAY CELLULAR OF FLORIDA	) File No. 10754-CL-P-497-A-89
For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A in)
Market 497 - Mississippi 5 - Washington)
FLORIDA CELLULAR	) File No. 10445-CL-P-505-A-89
For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A)
in Market 505 - Missouri 2-Harrison)
A-1 CELLULAR COMMUNICATIONS	) File No. 10454-CL-P-514-A-89
For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A)
in Market 514 - Missouri 11-Moniteau)
BRAVO CELLULAR	) File No. 10673-CL-P-579-A-89
For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A in)
Market 579 - North Carolina 15-Cabarrus)

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ALPHA CELLULAR) File No. 10909-CL-P-586-A-89
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For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A)
in Market 586 - Ohio 2-Sandusky)
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CEL-TEL COMMUNICATIONS) File No. 10912-CL-P-589-A-89
)
For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A)
in Market 589 - Ohio 5-Hancock)
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EJM CELLULAR PARTNERS) File No. 10567-CL-P-596-A-89
)
For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A)
in Market 596 - Oklahoma 1-Cimarron)
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PINELLAS COMMUNICATIONS) File No. 10808-CL-P-613-A-89
)
For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A)
in Market 613 - Pennsylvania 2-McKean)
)
CENTAUR PARTNERSHIP	) File No. 10720-CL-P-631-A-89
)
For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A in)
Market 631 - South Carolina 7-Calhoun)
)
SIGNAL CELLULAR COMMUNICATIONS	) File No. 10721-CL-P-632-A-89
)
For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A in)
Market 632 - South Carolina 8 - Hampton)
)
A-1 CELLULAR COMMUNICATIONS	) File No. 10409-CL-P-661-A-89
)
For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A)
in Market 661 - Texas 10-Navarro)
)
EJM CELLULAR PARTNERS	) File No. 10116-CL-P-721-A-89
)
For Facilities in the Domestic Public)
Cellular Telecommunications Radio)
Service on Frequency Block A)
in Market 721 - Wyoming 4-Niobrara)
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JAYBAR COMMUNICATIONS)	File No. 10042-CL-P-323-A-88
)	
For Facilities in the Domestic Public)	
Cellular Telecommunications Radio)	
Service on Frequency Block A)	
in Market 323 - Arizona 6-Graham for)	
Station KNKN 251)	
)	
DATA CELLULAR SYSTEMS	)	File Nos. 10029-CL-P-345-A-88
	)	07080-CL-P-MP-91
For Facilities in the Domestic Public)	
Cellular Telecommunications Radio)	
Service on Frequency Block A)	
in Market 345 - California 10-Sierra)	
for Station KNKN 250)	
)	
CELLULAR PACIFIC	)	File Nos. 10031-CL-P-346-A-88
	)	06606-CL-MP-90
For Facilities in the Domestic Public	)	06688-CL-MP-90
Cellular Telecommunications Radio)	
Service on Frequency Block A in)	
Market 346 - California 11-El Dorado)	
for Station KNKN 252)	
)	
NORTH AMERICAN CELLULAR	)	File No. 10066-CL-P-388-A-88
)	
For Facilities in the Domestic Public)	
Cellular Telecommunications Radio)	
Service on Frequency Block A in)	
Market 388 - Idaho 1-Boundary for)	
Station KNKN 253)	

TO: The Commission

OPPOSITION TO MOTION TO STRIKE

1. Castle Trust, Orbit Cellular, RSA Cellular Partners, Schuylkill Mobile Fone, Inc., Scott Reardon, Skyline Cellular Partners, Sunrise Trust, Walker Trust, and Turnpike Cellular Partners (collectively referred to herein as "Appellant-Petitioners") hereby oppose the Motion to Strike filed by various entities ^{1/} with respect to the Appellant-Petitioners' Statement

^{1/} The Moving Parties include: Alabama Wireless, Inc. (formerly Algreg Cellular Engineering); Cranford Cellular Communications; Bay Cellular of Florida; Florida Cellular; A-1 Cellular Communications; Bravo Cellular, LLC (formerly Bravo Cellular); Cel-Tel Communications of Ohio, Ltd. (formerly Cel-Tel
(continued...)

for the Record filed in the above-captioned proceeding on June 26, 1998. The Moving Parties urge that the Appellant-Petitioners' Statement for the Record be stricken because, according to the Moving Parties, the Appellant-Petitioners cannot legitimately claim to be interested parties before the Commission.^{2/} The Appellant-Petitioners respectfully submit that the Moving Parties are wrong.

2. As indicated in the Statement for the Record, each of the Appellant-Petitioners filed a timely application for one or more of the cellular authorizations in the markets listed in the caption hereof.^{3/} Those applications would not and could not be dismissed until a final grant of a competing application for the same markets. But no such final grant has yet occurred. Accordingly, the Appellant-Petitioners have pending applications, and grant of any mutually exclusive application would thus

^{1/}(...continued)
Communications); EJM Cellular Partners; Pinellas Communications; Centaur Partnership; Ohio Wireless, LLC (formerly Alpha Cellular); South Carolina Cellular Corporation (formerly Signal Cellular Communications); Jaybar Communications; Data Cellular Systems; Cellular Pacific; and North American Cellular.

^{2/} The Moving Parties also suggest, in a footnote, that some investigation of the Appellant-Petitioners should be undertaken. As the Appellant-Petitioners have previously indicated in their Supplement to Statement for the Record (filed July 23, 1998), no basis at all exists for any investigation, and no basis at all exists for the Moving Parties' glib claims of "greenmail".

^{3/} In this important regard the instant case is completely distinct from those cited by the Moving Parties. In those cases, the party whose participation was rejected as late had failed to participate at all until long after the relevant deadlines had passed. Here, by contrast, the Appellant-Petitioners all filed their applications in a timely fashion. That is, they were and have been parties from the earliest possible moment.

adversely affect Appellant-Petitioners.

3. The Moving Parties seem to suggest that, since Appellant-Petitioners did not aggressively pursue the Moving Parties through a years-long trial, the Appellant-Petitioners have somehow relinquished their right to prosecute their applications. But that is certainly not the case.

4. To be sure, in January, 1990 the Mobile Services Division ("MSD") did announce that questions had been raised about a number of applicants (including the captioned applicants), and the MSD then did invite the filing of pleadings by interested parties. Establishment of Procedural Dates for Commenting on Mutual Contingent Risk Sharing Agreements, Report No. CL-90-92, released January 31, 1990. But in so doing, the MSD did NOT say that a failure to file comments would result in the automatic dismissal of any non-participating competing applicant. To the contrary, the public notice specified that "[c]onsistent with the existing practice regarding nonwireline applications, other mutually exclusive applicants will be notified of filings by Public Notice". So it appears clear that, in establishing deadlines for various pleadings, the MSD did NOT intend to require the submission of such pleadings, or to impose the penalty of automatic dismissal for failure to file such pleadings.

5. The Moving Parties also cite the hearing designation order ("HDO") herein, Algreg Cellular Engineering, 6 FCC Rcd 8148 (Common Carrier Bureau 1991), as another point at which the

Appellant-Petitioners could and should have filed pleadings in order to protect their interests. But, again, the HDO imposed no requirement that an applicant participate in order to assure the continued vitality of its application.

6. What the HDO did say is the following:

In this proceeding, the only question to be resolved is whether the individual applicants have, in fact, entered into the Agreements or otherwise taken actions which made them parties to the risk sharing provisions. . . . [I]f it is found that they are bound by the Agreements then their applications should be denied.

Id., 6 FCC Rcd at 2928, ¶39. In other words, the HDO itself defined the limits of the hearing in terms of a single very narrow factual question. The legal consequences flowing from resolution of that factual question were unequivocal and, from the language of the HDO itself, not subject to debate. Under these circumstances, competing applicants with no direct information relating to the narrow factual question could certainly not have been expected to read the HDO as mandating their participation in the hearing at the risk of losing their ability to prosecute their applications. And yet, that appears to be the fate to which the Moving Parties would consign the Appellant-Petitioners. ^{4/}

^{4/} It should be noted that the Moving Parties loudly bemoan the length and complexity of the hearing process below. But if, as the Moving Parties seem to suggest, all competing applicants should have intervened in the hearing whether or not they had any direct information concerning the "only question" to be resolved in the hearing, the hearing process would doubtless have been far longer and more complex. That is, while the Moving Parties fuss about how the Appellant-Petitioners may be abusing the Commission's processes by asserting their rights now, the earlier
(continued...)

7. The problem presented here appears to be the result not of any lack of diligence by the Appellant-Petitioners (as the Moving Parties repeatedly suggest). Rather, the problem presented here arises from the fact that the Commission, in designating only a few (and far from all) of the competing applications for hearing, created a proceeding within a proceeding. That is, the Commission designated the hearing as a supplemental proceeding incident to the resolution of the broader proceeding, i.e., the disposition of the cellular authorizations in the particular markets involved. In creating that supplemental proceeding, the HDO gave no indication that failure to participate therein would jeopardize any applicants' rights. To the contrary, the HDO indicated that the hearing would merely focus on one factual question which, if answered in the affirmative, would result in denial of the subject applications.

8. Of course, that factual question was answered in the affirmative by the administrative law judge and by the Review Board (twice!), and the Commission itself did not see fit to reverse any of the factual findings. But the Commission changed the rules of the game, essentially concluding that notwithstanding the facts, and notwithstanding the HDO, the subject applications should not be denied. It is the height of

^{4/} (...continued)
participation which the Moving Parties suggest was de rigueur would have been more akin to such an abuse, especially in view of the HDO's own specific language limiting the scope of the hearing and the Appellant-Petitioners lack of information relating to factual matters within that scope.

arbitrariness and caprice to suggest that applicants who justifiably relied on the language of the HDO and who, not having any direct knowledge relating to the narrow factual question identified in the HDO, appropriately elected not to participate in the hearing itself, cannot now challenge the Commission's latterday, post-hearing, change in the rules.

9. The Appellant-Petitioners emphasize again, as they have stated before, that they do not intend to offer any arguments concerning the facts which were found in the hearing. Nor do they intend to offer new arguments concerning the unlawfulness of the Commission's change in standards. But the Appellant-Petitioners, as pending applicants, do intend to join in the arguments which have already been presented concerning the unlawfulness of that change.

Respectfully submitted,


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August 5, 1998

CERTIFICATE OF SERVICE

Harry F. Cole hereby certifies that on this 5th day of August, 1998, I caused copies of the foregoing "Opposition to Motion to Strike" to be hand-delivered (as indicated below) or sent via U.S. first class mail, postage prepaid, addressed to the following:

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